August 2004

MJI Publication Updates, Part 2

Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Criminal Procedure Monograph 7—Probation Revocation (Revised Edition)

Domestic Violence Benchbook (3rd Ed)

Juvenile Justice Benchbook (Revised Edition)

Managing a Trial Under the Controlled Substances Act

Sexual Assault Benchbook

Traffic Benchbook—Revised Edition, Vol. 2

August 2004

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.23 Motion to Dismiss Because of Double Jeopardy—Successive Prosecutions for the Same Offense

1. The "Same-Elements" Test Determines Whether Double Jeopardy Protection Is Implicated

Add the following case summaries to the May 2004 update to pages 51–52:

The rule requiring that all criminal charges arising from the same criminal episode be joined in a single trial—and thus, the rule prohibiting successive prosecutions based on the same criminal episode—does not apply where a defendant requests separate trials on offenses related to the same criminal episode. *People v Matuszak*, ___ Mich App ___, ___ (2004). In *Matuszak*, the defendant pleaded guilty to one CSC charge and proceeded, without objection, to trial on a second CSC charge. Both CSC charges arose from a single criminal episode about which the complainant gave conflicting testimony regarding the number of penetrations involved. The Court of Appeals denied the defendant's assertion that his two CSC convictions—one plea-based and one jury-based—violated double jeopardy principles. *Matuszak, supra*, ___ Mich App at ___. According to the Court, the defendant's conduct with regard to the two CSC convictions, pleading guilty to one count and proceeding to trial on the second, was the equivalent of requesting separate trials on related offenses and, therefore, did not implicate the defendant's double jeopardy protections. *Matuszak, supra*, ___ Mich App at ___.

Unless one crime is completed before the other crime takes place, a defendant's convictions for felony murder and for any necessarily included lesser offenses of the predicate felony violate the prohibition against double jeopardy. *People v Bulls*, ___ Mich App ___, ___ (2004). In *Bulls*, the defendant was convicted for felony murder based on armed robbery or attempted armed robbery and for assault with intent to rob while armed. The

defendant argued that his conviction for felony murder and his conviction for assault with intent to rob while armed violated the prohibition against double jeopardy. The prosecution argued that both convictions were proper under *People v Colon*, 250 Mich App 59, 62–63 (2002), because the defendant had completed his commission of the assault with intent to rob crime before the felony murder occurred. The Court of Appeals noted that attempted armed robbery is a necessarily included lesser offense of assault with intent to rob while armed so that conviction of the lesser offense and felony murder resulted in the same double jeopardy violation as would a separate conviction of attempted armed robbery and felony murder. The Court explained:

> "[D]uring trial the prosecution did not present the crimes of felony murder and assault with intent to rob while armed as separate incidents; rather it portrayed the facts in this case as a continuing sequence of events that culminated in the victim's death. We agree that the record supports the portrayal made by the prosecution at trial and establishes that the attempted armed robbery underlying defendant's convictions of felony murder and assault with intent to rob while armed was a continuing criminal enterprise. After forcefully entering the home, defendant and D-Mack walked the victim around at gunpoint while searching his home for items to steal. Only briefly before D-Mack shot the victim did defendant separate from D-Mack to enter a bedroom alone to search it. The fact that the attempted armed robbery continued throughout the entire criminal episode readily distinguishes this case from *Colon*, where the assaults were clearly separate events that took place over a ninety minute period, with the defendant ceasing one assault to search the premises and then later returning to beat the victim again. *Colon, supra* at 63–64." *Bulls, supra*, ___ Mich App at ___.

6.30 Motion to Suppress Eyewitness Identification at Trial Because of Illegal Pretrial Identification Procedure

1. Right to Counsel

Near the bottom of page 68, replace the second sentence in the first paragragh with the following:

A defendant's right to counsel at corporeal identifications attaches at the time adversarial judicial criminal proceedings are initiated against that defendant. *People v Hickman*, ___ Mich ___, ___ (2004). In *Hickman*, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. The Michigan Supreme Court's decision in *Hickman* overruled the Court's previous decision in *People v Anderson*, 389 Mich 155 (1973), where "the right to counsel was extended to all pretrial corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Hickman, supra*, ___ Mich at ___. The *Hickman* Court acknowledged that the *Anderson* rule represented the "policy preferences" of that Court but that the rule lacked any foundational basis in state or federal constitutional provision. Both the federal and state constitutional provisions on which a criminal defendant's right to counsel are based are prefaced by the phrase, "In all criminal prosecutions, ..." Said the *Hickman* Court:

> "[I]t is now beyond question that, for federal Sixth Amendment purposes, the right to counsel attaches only at or after the initiation of adversarial judicial proceedings.
>
> This conclusion is also consistent with our state constitutional provision, Const 1963, art 1, § 20[.]" *Hickman, supra*, ___ Mich at ___.

The Court added that "identifications conducted before the initiation of adversarial judicial criminal proceedings could still be challenged" on the basis that a defendant's due process rights were violated by the identification's undue suggestiveness or by other factors unfairly prejudicial to the defendant.

6.32 Motion in Limine—Impeachment of Defendant by His or Her Silence

Insert the following language near the top of page 75 before Section 6.33:

A defendant must testify at trial to preserve for appellate review his or her challenge to the trial court's ruling in limine permitting the prosecution to introduce evidence of the defendant's post-*Miranda* silence. *People v Boyd*, 470 Mich 363, 365 (2004). The requirement that a defendant testify in order to contest the admission of his or her post-*Miranda* silence is necessary because a defendant's post-*Miranda* silence *is* admissible in one very specific context—to rebut a defendant's assertion at trial that he or she told the police something contrary to what actually occurred during the defendant's statement to police. *Id*.

In *Boyd*, the defendant was charged with CSC-I for his assault of the twelve-year-old complainant. After the defendant answered several of the questions posed to him during a police interview, the police officer asked the defendant, "When you last saw her [the victim], how many times did you have sex with her?" The defendant responded, "I am taking the fifth on that one." The police officer ended the interview immediately. *Boyd, supra*, 470 Mich at 366.

The defendant moved in limine to suppress that portion of his statement to police at which he invoked his Fifth Amendment right to remain silent. The trial court denied the defendant's motion and ruled that the defendant's entire statement to police was admissible as evidence against the defendant at trial. The prosecution did not seek to admit the defendant's statement at trial, nor was the statement referred to in the prosecution's opening or closing argument. The defendant did not testify at trial. He was convicted of CSC-II. *Boyd, supra*, 470 Mich at 366–367.

On appeal, the defendant argued that his decision not to testify at trial was based on the trial court's ruling in limine allowing admission of his post-*Miranda* silence. In consonance with previous state and federal case law, the *Boyd* Court declined to

> "assume that the possible introduction of the 'taking the fifth' statement motivated defendant's decision not to testify. . . . . Because numerous factors undoubtedly influence a defendant's decision whether to testify, we refuse to speculate regarding what effect, if any, a ruling in limine may have had on this decision." *Boyd, supra*, 470 Mich at 376.

The Court further disagreed with the defendant's assertion that the trial court's ruling was erroneous without regard to whether he testified at trial because his invocation of his Fifth Amendment right to remain silent was inadmissible against him at trial under any circumstances. According to the Court:

> "[D]efendant's 'taking the fifth' statement would have been properly admissible in one context. The United States Supreme Court held in *Doyle* [*v Ohio*, 426 US 610, 619 (1976)], 'that the use for impeachment purposes of petitioners' silence at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment.' The Court recognized, however, that 'the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. *Id*. at 619 n 11."
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> * * *
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> "If defendant had offered exculpatory testimony at trial and claimed to have told his exculpatory story to the police in response to questioning, his silence would have been admissible for impeachment purposes." *Boyd*, *supra*, 470 Mich at 374–375.

In summary, the Court explained:

> "[D]efendant was required to testify to preserve for review his challenge to the trial court's ruling in limine allowing the prosecutor to admit evidence of defendant's exercise of his *Miranda* right to remain silent. Because the statement at issue in this case would have been properly admissible in one context, defendant's failure to testify precludes us from being able to determine whether the trial court's ruling was erroneous and, if so, whether the error requires reversal." *Boyd, supra*, 470 Mich at 378.

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following case summary before Section 6.37 on page 87:

The Michigan Supreme Court adopted the "good-faith" exception to the exclusionary rule in *People v Goldston*, ___ Mich ___ (2004). The "good-faith" exception was first announced by the United States Supreme Court in *United States v Leon*, 468 US 897 (1984), as a remedy for automatic exclusion of evidence obtained from a law enforcement officer's reasonable, good-faith reliance on a search warrant later found to be defective. According to the *Goldston* Court:

> "The purpose of the exclusionary rule is to deter police misconduct. That purpose would not be furthered by excluding evidence that the police recovered in objective, good-faith reliance on a search warrant." *Goldston, supra*, ___ Mich at ___.

August 2004

Update: Criminal Procedure Monograph 7—Probation Revocation (Revised Edition)

Part A—Commentary

7.35 Granting Credit for Time Served

Add the following text to the January 2004 update to page 32:

After the Court's opinion in *People v Seiders (Seiders I)*, 259 Mich App 538 (2003), discussed above, the Court of Appeals convened a conflict resolution panel and concluded that *Johnson, supra*—the case by which the *Seiders I* panel was bound—was wrongly decided. *People v Seiders (Seiders II)*, ___ Mich App ___, ___ (2004). The conflict resolution panel in *Seiders II* agreed with the previous panel's analysis of the applicable statutory language and affirmed the trial court's refusal to credit the defendant's sentence with time served as a parole detainee on a sentence he received in a foreign jurisdiction. *Seiders II*, *supra*, ___ Mich App at ___.

According to the *Seiders II* Court:

> "A defendant is only entitled to a sentencing credit under MCL 769.11b if he has been '*denied or unable to furnish bond*.'" MCL 769.11b (emphasis added). As the *Seiders* [*I*] Court noted, bond is neither set nor denied when a defendant is held in jail on a parole detainer. Apparently, the *Johnson* Court did not consider the fact that the defendant was incarcerated due to a parole detainer. Because defendant was held on a parole detainer, the question of bond is not an issue, and MCL 769.11b does not apply. *Seiders* [*I*], *supra* at 541." *Seiders II*, *supra*, ___ Mich App at ___.

August 2004

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.2 Former Testimony or Statements of Unavailable Witness

B. Statements by Witnesses Made Unavailable by an Opponent

Insert the following paragraph on page 165 immediately before Section 5.3:

The admission of an unavailable witness' former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, ___ Mich App ___ (2004). In *McPherson*, the defendant was convicted of murder. A co-defendant made a statement to police that identified the defendant as the shooter. Prior to trial the co-defendant died. His statement was admitted at trial. In applying the U.S. Supreme Court's holding in *Crawford v Washington*, ___ U.S. ___ (2004),* the Court of Appeals found the co-defendant's statement to police was "testimonial." However, the Court indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In *McPherson*, the statement of the co-defendant was admitted not for its substance, but to impeach the defendant. The Court concluded that admission of the statement for impeachment purposes did not violate either *Crawford v Washington*, *supra*, or the Confrontation Clause.

*For more information on *Crawford v Washington*, see the June 2004 update to Section 5.7.

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.8 Expert Testimony on Battering and Its Effects

A. Criteria for Admitting Expert Testimony

Insert the following text near the top of page 192 after the second paragraph:

The Michigan Supreme Court in *Gilbert v DaimlerChrysler Corp*, ___ Mich ___, ___ (2004), reiterated the trial court's gatekeeper responsibility in the admission of expert testimony under amended MRE 702. The Court stated:

**Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993).

> "MRE 702 has [] been amended explicitly to incorporate *Daubert's** standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony–regardless of whether the testimony is based on 'novel'[52] science–is reliable.
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> [52] See, e.g., *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983). Because the court's gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not 'novel' has no bearing on whether the court's gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of whether proffered evidence is 'novel.' . . ."
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> *Gilbert, supra* at ___.

The Court also indicated that the trial court must focus its MRE 702 inquiry on the data underlying the expert opinion and must evaluate the extent to which the expert extrapolates from that data in a manner consistent with *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993). *Gilbert, supra* at ___.

August 2004

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 7

Pretrial Proceedings in Delinquency Cases

7.4 Identification Procedures

C. Constitutional Requirements

Right to counsel.

Near the top of page 143, replace the first full sentence on this page with the following text:

A defendant's right to counsel at corporeal identifications attaches at the time adversarial judicial criminal proceedings are initiated against that defendant. *People v Hickman*, ___ Mich ___, ___ (2004). In *Hickman*, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. The Michigan Supreme Court's decision in *Hickman* overruled the Court's previous decision in *People v Anderson*, 389 Mich 155 (1973), where "the right to counsel was extended to all pretrial corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Hickman, supra*, ___ Mich at ___. The *Hickman* Court acknowledged that the *Anderson* rule represented the "policy preferences" of that Court but that the rule lacked any foundational basis in state or federal constitutional provision. Both the federal and state constitutional provisions on which a criminal defendant's right to counsel are based are prefaced by the phrase, "In all criminal prosecutions, ..." Said the *Hickman* Court:

> "[I]t is now beyond question that, for federal Sixth Amendment purposes, the right to counsel attaches only at or after the initiation of adversarial judicial proceedings.
>
> This conclusion is also consistent with our state constitutional provision, Const 1963, art 1, § 20[.]" *Hickman, supra*, ___ Mich at ___.

The Court added that "identifications conducted before the initiation of adversarial judicial criminal proceedings could still be challenged" on the basis that a defendant's due process rights were violated by the identification's undue suggestiveness or by other factors unfairly prejudicial to the defendant.

CHAPTER 7

Pretrial Proceedings in Delinquency Cases

7.6 Selected Search and Seizure Issues

Application of constitutional protections to minors.

Near the bottom of page 154, insert the following text immediately before the boldface text reading "**Burden of proof**":

In *People v Goldston*, ___ Mich ___, ___ (2004), the Michigan Supreme Court adopted the good-faith exception to the exclusionary rule established in *United States v Leon*, 468 US 897 (1984). The good-faith exception provides that if the police's good-faith reliance on a search warrant is objectively reasonable, the exclusionary rule will not bar the admission of the evidence even if the warrant is later found to be invalid.

CHAPTER 10

Juvenile Dispositions

10.12 Restitution

I. Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

Triple restitution for serious bodily impairment or death of a victim.

At the top of page 244, delete the first two paragraphs and the July 2003 update (discussing *Kreiner v Fischer*) and insert the following text:

According to the Michigan Court of Appeals in *People v Thomas*, ___ Mich App ___, ___ (2004), the phrase "serious impairment of a body function" as it is defined in the no-fault act, MCL 500.3135(1), is not relevant to a court's analysis of an injury resulting from a defendant's violation of MCL 750.81d(3)—resisting arrest and causing the police officer serious bodily impairment. The no-fault act's definition of the phrase and case law based on that interpretation are not applicable to circumstances like those in *Thomas* because MCL 750.81d(7)(c) expressly provides that "serious impairment of a body function" is to be defined as the phrase is defined in MCL 257.58c. *Thomas*, *supra*, ___ Mich App at ___.

The definition of "serious impairment of a body function" in MCL 257.58c is substantially similar to the definitions of this term in the provisions of the CVRA authorizing triple restitution for victims who sustain a serious bodily impairment as a result of an offender's criminal conduct. See MCL 780.766(5), 780.794(5), and 780.826(5). In *Thomas*, the Court of Appeals rejected both parties' assertion that the no-fault statute should be considered "in pari materia" with the definition in MCL 257.58c. The *Thomas* Court explained that the doctrine of "in pari materia" was inapplicable because

> "[t]he two statutes [MCL 257.58c and 500.3135(1)] do not relate to the same subject or share a common purpose. The no-fault act provides a system of civil compensation and liability for automobile accidents; the statute at issue [in *Thomas*] prohibits and criminalizes assaultive behavior while resisting an arrest." *Thomas, supra*, ___ Mich App at ___.

The Court also noted that a court may not look outside the statute at issue when, as in *Thomas*, the definitions of terms relevant to the dispute are provided in the statute itself. Thus, in *Thomas*, it was improper to consider the no-fault act's definition of "serious impairment of a body function" because MCL 750.81d(7) provided the definition of the phrase by direct reference to MCL 257.58c. Similarly, the statutory provisions governing triple restitution in cases involving serious bodily impairment under the CVRA contain a

definition of the phrase so that reference to the no-fault act's definition is improper.

Because the definition of "serious bodily impairment" used in MCL 750.81d(7)—the phrase as defined in MCL 257.58c—is substantially similar to the definitions used throughout the CVRA, the *Thomas* Court's disposition of the issue is relevant to cases under the CVRA involving the interpretation of "serious bodily impairment." The CVRA's definitions of the phrase are prefaced with "serious impairment of a body function includes, but is not limited to" the specific list of injuries included in the definitions. According to the *Thomas* Court:

> "[T]o determine whether injuries to the officer here constitute serious impairments of a body function under the statute, we consider their similarity to injuries within the statutory list." *Thomas, supra,* ___ Mich App at ___.

The same analysis applies to a determination of serious bodily impairment under the triple restitution provisions of the CVRA.

CHAPTER 23

Selected Issues Regarding Imposition of Adult Sentence

23.4 Alternative Sentences for Major Controlled Substance Offenses

Near the bottom of page 475, immediately before the last paragraph insert the following text:

*2002 PA 665 became effective March 1, 2003.

> The ameliorative effects of 2002 PA 665's amendment to MCL 333.7401(3) do not apply retroactively* where the amendments did not simply reduce the penalties possible for conduct identical under both the amended and preamended versions. *People v Doxey*, ___ Mich App ___, ___ (2004). As amended, MCL 333.7401(3) does not proscribe the same conduct as the preamended version; rather, 2002 PA 665 altered the quantities of controlled substances involved in each statutory provision so that "new" crimes of delivery were created at the same time that mandatory consecutive sentences were eliminated in specific situations. *Doxey*, *supra* at ___.

August 2004

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 15

Sentencing

15.2 Sentencing for Major Controlled Substance Offenses

C. Major Controlled Substance Offenses that Require Consecutive Sentences

4. Court of Appeals Cases Interpreting §7401(3)

Insert the following case summary immediately after the beginning of this sub-subsection near the top of page 322:

- *People v Doxey*, ___ Mich App ___ (2004)

The ameliorative effects of 2002 PA 665's amendment to MCL 333.7401(3) do not apply retroactively* where the amendments did not simply reduce the penalties possible for conduct identical under both the amended and preamended versions. As amended, MCL 333.7401(3) does not proscribe the same conduct as the preamended version; rather, 2002 PA 665 altered the quantities of controlled substances involved in each statutory provision so that "new" crimes of delivery were created at the same time that mandatory consecutive sentences were eliminated in specific situations.

*2002 PA 665 became effective March 1, 2003.

Note: For the purposes of the existing third bullet on page 322, which summarizes *People v Frederick Jones*, 2002 PA 665 amended MCL 333.7401(3) to eliminate the mandatory nature of consecutive sentences under specific circumstances. See the April 2003 update to Section 15.2(C).

August 2004

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.4 "Assault" Offenses

A. Assault With Intent to Commit Criminal Sexual Conduct Involving Penetration

2. Elements of Offense

On page 44, insert the following text before the "Note" near the middle of the page:

In *People v Nickens,* ___ Mich ___, ___ (2004), the Michigan Supreme Court affirmed that the elements of assault with intent to commit criminal sexual conduct involving penetration are as follows:

- The defendant committed an assault; and,
- The defendant had the intent to commit criminal sexual conduct involving penetration.

CHAPTER 2

The Criminal Sexual Conduct Act

2.6 Lesser-Included Offenses Under CSC Act

B. Applicable Statute and Three-Part Test

Insert the following case summary on page 110 immediately before the beginning of subsection C:

**People v Cornell*, 466 Mich 335 (2002).

In *People v Nickens*, ___ Mich ___ (2004), the Supreme Court applied the three-part test outlined in *Cornell** and MCL 768.32. In *Nickens*, the defendant was charged with first-degree criminal sexual conduct involving personal injury and the use of force or coercion to accomplish sexual penetration, MCL 750.520b(1)(f). At trial, the court instructed the jury on this charge and on the charge of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). The defendant objected to the latter instruction. The defendant was found guilty of violating MCL 750.520g(1). *Nickens, supra* at ___.

The Supreme Court found that the elements of assault with intent to commit criminal sexual conduct involving penetration are (1) an assault and (2) an intent to commit criminal sexual conduct involving sexual penetration. Nonconsensual sexual penetration with another is an "attempted-battery" assault and a battery; therefore, the first element above is always satisfied when the actor violates MCL 750.520b(1)(f). In addition, the intent to commit criminal sexual conduct involving sexual penetration is always present when the defendant commits first-degree criminal sexual conduct under MCL 750.520b(1)(f). Because the elements of assault with intent to commit criminal sexual conduct involving penetration under MCL 750.520g(1) are included in first-degree criminal sexual conduct under MCL 750.520b(1)(f), assault with intent to commit criminal sexual conduct involving penetration is a necessarily lesser-included offense of first-degree criminal sexual conduct. *Nickens, supra* at ___. The Court found that a rational view of the evidence in this case supported the instruction of assault with intent to commit a criminal sexual conduct involving penetration. *Nickens, supra* at ___.

CHAPTER 7
General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text on page 364 after the April 2004 update:

The admission of an unavailable witness' former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, ___ Mich App ___ (2004). In *McPherson*, the defendant was convicted of murder. A co-defendant made a statement to police that identified the defendant as the shooter. Prior to trial, the co-defendant died but his statement was admitted at trial. In applying the U.S. Supreme Court's holding in *Crawford v Washington*, ___ U.S. ___ (2004),* the Court of Appeals found the co-defendant's statement to police was "testimonial." However, the Court indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In *McPherson*, the statement of the co-defendant was admitted not for its substance, but to impeach the defendant. The Court concluded that admission of the statement for impeachment purposes did not violate either *Crawford v Washington*, *supra* or the Confrontation Clause.

*See the April 2004 Update for a discussion of *Crawford v Washington*.

CHAPTER 8

Scientific Evidence

8.2 Expert Testimony in Sexual Assault Cases

A. General Requirements for Admissibility of Expert Testimony

Insert the following text immediately after the January 2004 update to pages 402 and 403:

The Michigan Supreme Court in *Gilbert v DaimlerChrysler Corp*, ___ Mich ___, ___ (2004), reiterated the trial court's gatekeeper responsibility in the admission of expert testimony under amended MRE 702. The Court stated:

**Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993).

> "MRE 702 has [] been amended explicitly to incorporate *Daubert's** standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony–regardless of whether the testimony is based on 'novel'[52] science–is reliable.
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> [52] See, e.g., *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983). Because the court's gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not 'novel' has no bearing on whether the court's gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of whether proffered evidence is 'novel.' . . ."
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> *Gilbert, supra* at ___.

The Court also indicated that the trial court must focus its MRE 702 inquiry on the data underlying the expert opinion and must evaluate the extent to which the expert extrapolates from that data in a manner consistent with *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993). *Gilbert, supra,* at ___.

August 2004

Update: Traffic Benchbook—Revised Edition, Volume 2

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.9 General Sentencing Considerations for §625 and §904 Offenses

F. Applying the Sentencing Guidelines

To the September 2003 update to pages 2-51 and 2-52, add new subsection (2) and the case summary following it, as indicated below:

2. Sentence Departures

MCL 769.34(2)(a) contains a provision expressly applicable to sentencing situations involving violations of the Michigan Vehicle Code (MVC). In relevant part, MCL 769.34(2)(a) states:

> "If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code [] authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section."

In *People v Hendrix*, ___ Mich App ___ (2004), the defendant was convicted of OUIL-3d and DWLS (second offense). The prosecutor requested that the defendant be sentenced to prison—to the jurisdiction of the department of corrections—for one to five years as authorized by MCL 257.625(8)(c)(*i*). *Hendrix, supra*, ___ Mich App at ___. The statutory sentence guidelines as calculated for the defendant resulted in a recommended minimum range of 0 to 11 months. *Hendrix, supra*, ___ Mich App at ___. The trial court sentenced the defendant to one year probation to be served in the county jail. *Hendrix, supra*, ___ Mich App at ___.

The Michigan Court of Appeals first denied the prosecutor's application for leave to appeal but the Michigan Supreme Court remanded the case to the Court of Appeals as if on leave granted. The Supreme Court specifically instructed the Court of Appeals

> "to address whether MCL 257.625(8)(c) 'mandates a minimum sentence for an individual sentenced to the Department of Corrections' within the meaning of MCL 769.34(2)(a), as well as the applicability of MCL 769.34(4)(a) under these circumstances." Court of Appeals order dated July 8, 2004, in which the Court vacated its previous opinion and issued a new opinion in *People v Hendrix.*

In its new opinion, the Court of Appeals concluded that the sentencing alternatives provided in MCL 257.625(8)(c)(*i*) and (*ii*) for OUIL-3d offenders reflected the sentencing scheme referenced by MCL 769.34(2)(a). Under MCL 257.625(8)(c), a trial court is mandated to impose a fine *and* one of two sentence alternatives provided by the statute. In addition to the mandatory fine imposed (from $500.00 to $5,000.00 at the court's discretion), the court is required to sentence the defendant to the jurisdiction of the Department of Corrections (for a minimum of one year and a maximum of five years) *or* to sentence the defendant to probation with imprisonment in the county jail (for a minimum of 30 days and a maximum of one year) and community service (for a minimum of 60 days and a maximum of 180 days). MCL 257.625(8)(c).

The *Hendrix* Court explained that the sentencing court has discretion to choose between the two alternatives presented in the MVC, each of which had a mandatory minimum term associated with that alternative. *Hendrix, supra*, ___ Mich App at ___. The Court further explained that the MVC alternatives were clearly addressed by the statutory language in MCL 769.34(2)(a), which authorized the trial court to impose a sentence *less than* the minimum sentence mandated by the MVC *if* the MVC mandated a minimum sentence for a defendant sentenced to the jurisdiction of the Department of Corrections. *Hendrix, supra*, ___ Mich App at ___. According to the plain language of MCL 769.34(2)(a), a sentence that exceeded the range recommended by the guidelines is not a departure if the sentence is less than the minimum sentence mandated for a defendant sentenced to the jurisdiction of the Department of Corrections. *Hendrix, supra*, ___ Mich App at ___.

In *Hendrix*, the trial court properly sentenced the defendant according to the alternative available under MCL 257.625(8)(c)(*ii*)—to one year of probation to be served in the county jail—a sentence that exceeded the defendant's guidelines range of 0 to 11 months, but which fell below the mandatory minimum term of one year if the defendant had been sentenced to the jurisdiction of the Department of Corrections. The *Hendrix* Court further concluded that MCL 769.34(4)(a), which requires a "substantial and compelling" reason to depart from a minimum sentence range, did not apply to the defendant's sentence. *Hendrix, supra*, ___ Mich App at ___ n 1. Without elaboration, the Court held that MCL 769.34(4)(a) did not apply

because the defendant's sentence was governed by the language in MCL 769.34(2)(a), which specifically addressed sentences under the MVC.